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Federal Communications Commission
Office of the Secretary

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Petition of SBC Communications Inc | ) | WC Docket No. 04-29 |
| For Forbearance from the Application of | ) | |
| Title II Common Carrier Regulation to | ) | |
| IP Platform Services | ) | |

**PETITION OF SBC COMMUNICATIONS INC. FOR FORBEARANCE**

Pursuant to 47 C.F.R. § 1.53 and 47 U.S.C. § 160(c), SBC Communications Inc. ("SBC") hereby petitions the Commission to forbear from applying Title II common carrier regulation to IP platform services. SBC has today petitioned the Commission to declare that IP platform services, as defined in that petition: (1) are interstate communications subject to the Commission's exclusive jurisdiction under Title I of the Communications Act; (2) do not fit any of the service-specific legacy regulatory regimes in Titles II, III, or VI of the Communications Act, notwithstanding that particular applications riding on top of the IP platform may have attributes of traditional services regulated under those Titles, and (3) are not subject to the *Computer II* requirements.[1] The background discussion in that petition, including the definition of IP platform services, is equally applicable to the instant request for forbearance, and SBC incorporates that discussion by reference. A copy of that petition is attached for reference.

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[1] Petition of SBC Communications Inc. for a Declaratory Ruling Regarding IP Platform Services (filed Feb. 5, 2004).

## DISCUSSION

The Commission should eliminate any doubt concerning the unregulated status of IP platform services by expressly forbearing from applying Title II regulation to these services to the extent that such regulation might otherwise be found to apply. By doing so, the Commission will ensure that IP platform services will be permitted to thrive in accordance with the mandates of the Act and established Commission policies.[2] Forbearance will not prevent the Commission from fashioning under Title I whatever regulations it reasonably finds to be needed to achieve important public policy objectives such as universal service, public safety/E911, communications assistance for law enforcement, and disability access. Nor will it threaten competitive access to the legacy facilities that are regulated under Title II today.

### I. FORBEARANCE FROM TITLE II REGULATION, IN CONJUNCTION WITH A DECLARATORY RULING REGARDING IP PLATFORM SERVICES, IS NECESSARY TO PROVIDE REGULATORY CERTAINTY.

Forbearance, in conjunction with a declaratory ruling, will provide regulatory certainty on a national basis and promote investment in, and the development of, IP platform services.

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[2] *See, e.g.*, 47 U.S.C. § 230(b)(2) (declaring that it "is the policy of the United States" to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation"); 47 U.S.C. § 157(a) notes (directing the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," using "regulatory forbearance" and "other regulating methods that remove barriers to infrastructure investment"), Preamble to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (stating that it is the purpose of the Telecommunications Act of 1996 to "reduce regulation in order to . . . encourage the rapid deployment of new telecommunications technologies"); Notice of Proposed Rulemaking, *Local Competition and Broadband Reporting*, 14 FCC Rcd 18100, 18130 ¶ 61 (1999) ("The Commission does not regulate internet services[.]"); Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11540 ¶ 82 (1998) ("We recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are appropriately applied to it.").

The Commission followed a similar two-step approach with respect to cable modem service. After concluding that cable modem service is an "information service" that is not subject to common carrier regulation under Title II, the Commission proceeded on its own motion to forbear from the application of *Computer II* requirements and tentatively concluded that forbearance from applying *any* Title II regulation was appropriate.[3] The Commission did so specifically in light of adverse court precedent that could potentially threaten its substantive conclusion concerning the regulatory classification of cable modem service but that preserved the possibility of forbearance.[4] As the Commission explained:

> Given that cable modem service will be treated as an information service in most of the country, we tentatively conclude that the public interest would be served by the uniform national policy that would result from the exercise of forbearance to the extent cable modem service is classified as a telecommunications service. We also believe that forbearance would be in the public interest because cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing.[5]

This rationale applies with even greater force here, given the uncertainty that is being created by the courts and state regulators about the regulatory status of IP platform services. In particular, the Ninth Circuit's decision in *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), which holds that cable modem service contains a Title II "telecommunications service," has disturbed the industry's previous understanding that IP platform services are

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[3] *See* Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, 4825-26 ¶ 45, 4847 ¶ 94 (2002) ("*Cable Modem Order*"), *rev'd on other grounds sub nom. Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

[4] *See id.* at 4847 ¶ 94.

[5] *Id.* at 4847-48 ¶ 95.

immune from legacy regulation under current law Significantly, however, the Ninth Circuit left intact the Commission's tentative decision in the *Cable Modem Order* to forbear from the application of Title II regulation to cable modem service [6] Forbearance thus is not only appropriate but prudent to ensure that any uncertainties about regulatory classification do not undermine the Commission's national policy of deregulation. The Commission should dispel the legal uncertainty created by *Brand X* (and other decisions and regulatory proceedings) and restore a stable deregulatory environment for IP platform services as a whole by exercising its considerable discretion under Section 10 to forbear from applying any Title II or other legacy regulation that might otherwise be found to apply to them

## II. SECTION 10 OF THE COMMUNICATIONS ACT REQUIRES THE COMMISSION TO FORBEAR FROM APPLYING TITLE II REGULATION TO IP PLATFORM SERVICES.

Section 10 of the Communications Act requires the Commission to forbear from applying regulations that are (1) "not necessary to ensure that . charges, practices, classifications, or regulations . are just and reasonable and *are not unjustly or unreasonably discriminatory*," (2) "not necessary for the protection of consumers," and (3) not consistent with "the public interest "[7] Each of these criteria applies to require forbearance from Title II common carrier regulation of IP platform services.

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6 *See Brand X*, 345 F.3d at 1132 n.14.

7 47 U S C. § 160(a).

### A. Title II Regulation of IP Platform Services Is Not Consistent with the Public Interest.

First, and above all else, Title II regulation of IP platform services is decidedly inconsistent with — and in fact, affirmatively harmful to — the public interest. For the reasons described in SBC's petition for a declaratory ruling, Title II constraints are both unnecessary to ensure the fairness of the terms under which IP platform services are offered and harmful to the continued development of the Internet. Because no single entity or class of entities dominates the provision of IP platform services, and because multiple vendors specialize in providing facilities, software, or services, the market for IP platform services operates well without regulation. This widespread competitive parity will be sustained going forward by the nature of the Internet itself, whose open-standards-based architecture lowers barriers to entry. Title II regulation would distort the workings of these market forces by imposing new costs on some participants but not others, interfering with the cooperative business relationships of the various market participants, and discouraging some types of new entrants from taking advantage of the openness of IP platforms to enter or offer new and diverse services.

The Commission has long recognized that "the advent and growth of competition in a particular market eliminates the need for continued regulation."[8] Indeed, the Commission has acknowledged that imposing regulation in a competitive market can be affirmatively harmful: "Regulation often can distort the workings of the market by imposing costs on market

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[8] Report and Order, *Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)*, 95 F.C.C.2d 1276, 1301 ¶ 38 (1983)

participants which they otherwise would not have to bear."[9] The Commission has expressed a longstanding preference for "using a market-based approach," reasoning that, where competition has developed and markets are open, this "should minimize the potential that regulation will create and maintain distortions in the investment decisions of competitors as they enter local telecommunications markets."[10]

That is clearly the appropriate approach here. Title II regulation of IP platform services would impede the innovation and investment that are essential to the Internet's continued growth. As the Commission has repeatedly noted, it can "'encourage investment and innovation by reducing regulatory obligations;'"[11] to regulate where regulation is *unnecessary* has the exact opposite effect, as does even the threat of unnecessary regulation. Forcing some or all IP platform services into Title II (or leaving open the possibility that this is imminent) would likely lead providers to tailor their services to avoid or accommodate regulatory requirements instead of to meet customer needs and utilize the capabilities of emerging technologies. Providers would have an incentive to develop products that most closely resemble traditional information services while deliberately excluding from their offerings any features or applications that could arguably be categorized as telecommunications services subject to Title II regulation. As a result,

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9 *Id.*

10 First Report and Order, *Access Charge Reform*, 12 FCC Rcd 15982, 16094 ¶ 263 (1997) ("*Access Charge Reform Order*")

11 Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 16999-17000 ¶ 22 (2003) ("*Triennial Review Order*") (quoting Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3705 (1999)).

regulation would drive the design of these services, preventing the realization of the full potential of IP platforms as vehicles of communications. This result would be contrary to the Commission's undeniable public interest obligation to continue to take notice of IP-based technology and promote the development and use of IP technology to support advanced services.[12]

In addition to deterring investment and innovation, Title II regulation of IP platform services would become almost instantaneously outdated, in light of the rapid pace of technological change that has characterized the Internet's development thus far. Title II regulation is too rigid to keep pace with the evolution of IP technology. IP platforms enable myriad permutations of services and applications that blur regulatory boundaries by mimicking traits of telecommunications services and services governed by the Act's other substantive Titles. Any attempt to regulate IP platform services would reflect nothing more than a snapshot of one moment in the evolution of these services. Therefore, applying Title II regulation in any meaningful, consistent fashion would involve a game of constant catch-up, in which regulation would always lag behind the market by a considerable degree. Because Title II is inherently incapable of fairly or practicably regulating IP platform services, such regulation can hardly be said to be "necessary." Indeed, the Commission's prior determinations — sometimes implicit — that Title II regulation should *not* apply to many IP platform services, networks, and service providers, are themselves evidence that such regulation cannot be characterized as "necessary."

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[12] *See, e.g.*, 47 U.S.C. § 157(a) notes (directing the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," using "regulatory forbearance" and "other regulating methods that remove barriers to infrastructure investment").

Forbearance is appropriate with respect to *all* IP platform services. Title II regulation of some but not all IP platform services would be inherently impractical. In light of the variety and multiplicity of participants in the Internet marketplace, there is no principled place to start — or for that matter, to stop — regulation. In contrast to the circuit-switched network, which has a more clearly delineated hierarchy of carriers that operate the underlying facilities and carriers that seek their use, the Internet environment is not readily stratified. Once regulation of an IP platform service commenced, there would be no basis for declining to extend similar treatment to every similar service provided by any other type of entity. Regulation of selected IP platform services would also confront the fact that all such services generally ride the same IP platforms. For example, the IP routers and facilities used to provide customized IP-based virtual private networks ("IP-VPNs") frequently are the same routers and facilities used to provide the "best efforts" services provided over the public Internet.

Thus, it would be increasingly difficult to regulate discrete services or applications without affecting other IP platform capabilities. Selecting some IP platform services for regulation would tend to lead to regulation of the Internet as a whole. This risk would aggravate, rather than alleviate, the regulatory uncertainty that exists today in this area, as no provider of IP platform services would be able to predict the ways in which Title II regulation might apply to its products. And as the Commission has recognized, "a stable and predictable federal regulatory environment . . . is conducive to continued investment . . . [and] minimiz[es] regulatory uncertainty and any consequent chilling of investment activity."[13]

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[13] Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1421 ¶ 25

A Commission determination that IP platform services must remain unregulated will have no effect on rights of access to legacy, non-IP-based services and certain of the facilities that support them. First, no matter what services an ILEC might provide over given facilities in its network, a CLEC would still be entitled to lease those underlying network elements that meet the standards of section 251(d)(2), as such standards are evaluated from time to time by the Commission. Thus, to the extent the Commission retains unbundling obligations for xDSL-capable loops, as an example, that obligation would survive a determination that IP platform services offered over that loop are unregulated. Furthermore, ILECs would remain subject to the *Computer II* obligations in offering non-IP-based information services, thus ensuring unbundled access to the basic serving elements of these legacy services.[14] For instance, ILECs would retain their existing obligations to provide ISPs with access to legacy, non-IP-enabled frame relay and ATM services on a common carriage basis. Likewise, ISP access rights to today's common carrier DSL transport services would be untouched by a Commission declaration that IP platform services are unregulated. Today, DSL transport is an ATM-based transmission service; the only DSL transport that would receive unregulated treatment is a DSL transport functionality that

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(1994); *see also Cable Modem Order* at 4802 ¶ 5 ("[W]e seek to remove regulatory uncertainty that in itself may discourage investment and innovation."); Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, 3022-23 ¶ 5 (2002) (the Commission's "policy and regulatory framework will work to foster investment and innovation in these networks by limiting regulatory uncertainty and unnecessary or unduly burdensome regulatory costs"); *Triennial Review Order*, Separate Statement of Chairman Michael K. Powell at 17519 (the absence of "clear and sustainable rules" may result in "a molten morass of regulatory activity that may very well wilt any . . investment interest . . . .").

[14] As permitted by the *Computer II* framework, of course, carriers may seek and obtain relief from such obligations where appropriate. In any event, such relief pertaining to legacy services would not be a function of the relief requested in this petition.

meets the standard articulated herein — that is, it allows the customer to send or receive communications in IP format. On the other hand, Internet backbones, which already provide backbone customers with the ability to send and receive communications in IP format, would continue to be free of any such unbundling requirements, as they are today. Concerns about barriers to entry and bottleneck facilities on the circuit-switched network thus are not implicated by this petition, which seeks forbearance solely with respect to the IP platforms that overlay those facilities and the related services.

### B. Title II Regulation of IP Platform Services is Not Necessary to Protect Consumers.

Title II regulation of IP platform services also is not necessary to protect consumers. As the Commission has recognized

> Competitive markets are superior mechanisms for protecting consumers by ensuring that goods and services are provided to consumers in the most efficient manner possible and at prices that reflect the cost of production. Accordingly, where competition develops, it should be relied upon as much as possible to protect consumers and the public interest.[15]

The history of IP platform services perfectly illustrates this general rule. As explained in SBC's companion petition for a declaratory ruling, consumers already have benefited tremendously from the hands-off policy that has made the Internet's exponential growth possible. Therefore, regulation would not only fail to afford consumers any additional protections, but it would in fact harm them by providing disincentives to continued innovation and thus limit the range of IP platform services that are available

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[15] *Access Charge Reform Order* at 16094 ¶ 263.

Furthermore, forbearance from applying Title II economic regulation to IP platform services will not preclude the formulation and application of regulations designed to protect public safety and consumer interests. As explained in SBC's petition for a declaratory ruling, to the extent the public interest requires the application of individual regulatory requirements to IP platform services to address public safety or other such concerns, the Commission has the authority to act under Title I and to tailor the requirements specifically to the context of IP platform services.

### C. Title II Regulation of IP Platform Services Is Not Necessary to Ensure That Charges and Practices in Connection with Such Services Are Just and Reasonable and Not Unjustly or Unreasonably Discriminatory.

Finally, Title II regulation is not necessary to ensure that IP platform services will be offered in a just, reasonable, and nondiscriminatory manner. As noted above and explained more fully in SBC's petition for a declaratory ruling, the market for IP platform services is already highly competitive and operates pursuant to cooperative business arrangements. Thus, market forces will continue to ensure that rates will be kept at reasonable levels and that providers' practices — with respect to consumers and to each other — will remain reasonable and nondiscriminatory. As a result, Title II regulation of IP platform services will be unnecessary.

Any doubt about the appropriateness of forbearance in this context should be resolved by section 706 of the 1996 Act, which directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability" through "regulatory forbearance" and "other regulating methods that remove barriers to infrastructure investment."[16] Although the Commission has not viewed section 706 as an *independent* source of forbearance

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[16] 47 U.S.C. § 157(a) notes.

authority, it has emphasized that the mandate of section 706 to promote broadband investment through "regulatory forbearance" weighs heavily in favor of forbearing under section 10 from unnecessary regulation of advanced services. "[S]ection 706(a) directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage the deployment of advanced services."[17] The Commission should do so here.

## CONCLUSION

For these reasons and the reasons stated in SBC's accompanying petition for declaratory ruling, the Commission should forbear from applying Title II common carrier regulation to IP platform services.

Respectfully submitted,


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February 5, 2004

[17] Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24044-45 ¶ 69 (1998).

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**PETITION OF SBC COMMUNICATIONS INC. FOR A DECLARATORY RULING**

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## SUMMARY

Congress directed the Commission to ensure that the Internet be kept "unfettered by Federal or State regulation,"[1] and to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" through the removal of regulation.[2] With this petition, SBC asks the Commission to implement that directive with respect to the numerous innovative services based on the Internet Protocol ("IP") that are rapidly proliferating in the communications market today. Specifically, SBC seeks confirmation that IP platform services — defined as those services that enable any customer to send or receive communications in IP format over an IP platform — are not subject to Title II regulation.

Title II regulation of IP platform services would be both unnecessary and harmful. In contrast to the public switched telephone network ("PSTN,") the IP platform is an overlay network characterized by low barriers to entry, making this market highly competitive without any need for governmental intervention. Regulation of these services would discourage innovation and investment, and would be unable to keep pace with the rapidly developing technology of the Internet. In fact, investment and innovation in IP platform services are already being threatened by regulatory uncertainty that has arisen as state commissions and courts begin to regulate IP platform services in the absence of definitive action by the Commission precluding them from doing so.

In order to create a stable deregulatory framework for IP platform services, the Commission should declare that such services are categorically interstate communications that

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1 47 U.S.C. § 230(b)(2).

2 *Id.* § 157(a) notes.

are subject to the Commission's exclusive jurisdiction under Title I of the Communications Act. By virtue of the internationally dispersed nature of the Internet itself, IP platform services are inherently interstate for the same reasons cited by the Commission with respect to the Internet. To the extent the Commission finds a need to regulate IP platform services, it may use its Title I authority to tailor specific regulatory requirements regarding such issues as E911 compliance, communications assistance to law enforcement, universal service, and access for disabled persons.

The Commission should also declare that IP platform services are not subject to the Title II regime applicable to telecommunications carriers. Because IP platform services intrinsically offer the capability for manipulating information, they are correctly viewed as "information services," which the Commission has recognized are properly treated under Title I. In addition, IP platform services can be classified as "private carriage" offerings, since they are provided through individually tailored commercial arrangements.

In addition, the Commission should declare that the *Computer II* unbundling requirements do not apply to IP platform services. Requiring providers of IP platform services to isolate a transmission component of each offering and provide it as a telecommunications service would, like the imposition of Title II regulation generally, constrain the innovation and investment that are essential to the continued development of these technologies.

A Commission declaration limiting the scope of Title II regulation as requested herein would in no way affect existing regulation of legacy services and facilities by either state or federal regulators, or predetermine the outcome of pending proceedings relating to legacy broadband services. No matter what services an ILEC might provide over facilities in its network, a CLEC would still be entitled to lease those underlying network elements that meet the

standards of section 251(d)(2), as such standards are evaluated from time to time by the Commission. Furthermore, ILECs would remain subject to the *Computer II* obligations in offering non-IP-based information services, thus ensuring unbundled access to the basic serving elements of these legacy services.

In sum, by declaring that IP platform services are not subject to Title II regulation, the Commission would preclude the encroachment of common carrier regulation into the IP sphere, maintain the status quo for IP platform services, and accommodate with regulatory certainty the evolution of IP network technology, services, and applications.

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**PETITION OF SBC COMMUNICATIONS INC. FOR A DECLARATORY RULING**

Pursuant to 47 C.F.R. § 1.2, SBC Communications Inc. ("SBC") hereby petitions the Commission to reaffirm that its longstanding practice of regulatory restraint with respect to the Internet will continue to apply to the inextricably linked services and network functionalities that rely on the Internet Protocol ("IP") platform, referred to herein as "IP platform services."[3] The Commission wisely has shown no signs of departing from its established approach in this context, which is mandated by Congress's directive to keep the Internet, which is simply a vast collection of interconnected IP platforms, "unfettered by Federal or State regulation."[4] But other regulatory bodies *have* begun to take divergent actions in the absence of a definitive Commission statement precluding them from doing so. Given the resulting legal uncertainty, the Commission should now formalize its nonregulatory policy to ensure that the Internet remains insulated from unnecessary and harmful economic regulation at both the federal and state levels. Myriad

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[3] As discussed more fully below, "IP platform services" consist of (a) IP networks and their associated capabilities and functionalities (*i.e.*, an IP platform), and (b) IP services and applications provided over an IP platform that enable an end user to send or receive a communication in IP format.

[4] 47 U.S.C. § 230(b)(2).

entities of all kinds are today providing or poised to provide IP platform services of diverse types. Prompt Commission action is therefore critical to provide regulatory certainty and stability and to ensure that the Internet success story will continue.

Such action should include three steps. *First*, the Commission should confirm that IP platform services are indivisibly interstate communications and therefore fall within the Commission's exclusive regulatory jurisdiction under Title I of the Communications Act. To the extent the Commission finds it appropriate from time to time to impose particular regulatory obligations on such services, it may do so pursuant to its Title I authority. *Second*, the Commission should rule definitively that IP platform services do not fit any of the service-specific legacy regulatory regimes in Titles II, III, or VI of the Communications Act, notwithstanding that particular applications riding on top of the IP platform may have attributes of traditional services regulated under those Titles.[5] *Third*, the Commission should declare that the *Computer II* unbundling requirements do not apply to IP platform services or IP platforms.

Fencing IP platform services off from economic regulations traditionally applied to legacy telecommunications services would not put them beyond the reach of regulation necessary to promote important public policy goals (such as universal service, public safety/E-911, communications assistance for law enforcement, and disability access), nor would it threaten competitive access to the legacy facilities underlying these services. But it would mean that future regulatory decisions would start from the premise that IP platform services are

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[5] To remove any doubt about the inapplicability of Title II or the other service-specific Titles of the Act to IP platform services, the Commission should forbear from applying any such provisions that might otherwise be found to apply. SBC is filing its forbearance request in a separate petition. That petition incorporates the arguments presented herein by reference, in light of the close relationship between SBC's requests for a declaratory ruling and for forbearance.

unregulated. Neither regulators nor courts would address these services from a presumption that legacy economic regulations under Titles II, III, or VI apply unless removed on a piecemeal basis. Rather, the Commission could craft and apply any necessary and appropriate regulatory requirements under Title I. Only by establishing this "bottom up" approach can the Commission remain true to its properly lauded tradition of fostering the growth of the Internet through a policy of prudent "unregulation."[6]

## BACKGROUND

In enacting the Telecommunications Act of 1996, Congress made unequivocally clear that the Internet should remain unregulated. As Congress found, "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation."[7] Accordingly, Congress declared that it "is the policy of the United States" to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*."[8] Congress viewed the elimination of unnecessary and harmful regulation as essential to promoting the Internet's continued growth; its very purpose in passing the Telecommunications Act of 1996 was to "reduce regulation in order to . . . encourage the rapid deployment of new telecommunications technologies."[9] Congress therefore directed the Commission to "encourage

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6 *See* Jason Oxman, *The FCC and the Unregulation of the Internet*, Office of Plans and Policy, OPP Working Paper No. 31, Federal Communications Commission (July 1999), *available at* http:// ftp.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf.

7 47 U.S.C. § 230(a)(4).

8 *Id.* § 230(b)(2) (emphasis added).

9 Preamble to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," using "regulatory forbearance" and "other regulating methods that remove barriers to infrastructure investment."[10] In order to facilitate the Commission's execution of these mandates, Congress defined the Internet broadly and inclusively.[11]

As IP platform services evolve and supplant legacy communications services throughout the industry, and as nontraditional providers of all types enter this market, the Commission should exercise its considerable discretion to maximize the potential of IP platform services by affirming conclusively that they are securely outside legacy economic regulation. Consistent with that goal, this petition asks the Commission to adopt a comprehensive federal solution as promptly as possible and to embrace an appropriately broad understanding of the services and networks subject to an express hands-off policy for the Internet.[12]

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[10] 47 U.S.C. § 157(a) notes.

[11] *See id.* § 231(e)(3) ("The term 'Internet' means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information."); *id.* § 230(f)(1) (defining the Internet as "the international computer network of both Federal and non-Federal interoperable packet switched data networks"); *id.* § 230(f)(2) (defining interactive computer service to include "any information service, system, or access software provider . . . including specifically a service or system that provides access to the Internet . . . .").

[12] The Commission is currently considering the application of its *existing* access charge rules to long distance voice *telecommunications services* that use IP as a transport technology. *See Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Docket No. WC-02-361 (filed Oct. 18, 2002). We urge the Commission to resolve that matter expeditiously. *See* Opposition of SBC Communications Inc., *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Docket No. WC 02-361 (Dec. 18, 2002); Reply Comments of SBC Communications Inc., *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Docket No. WC-02-361 (filed Jan. 24, 2003); Ex Parte Letter from James Smith, SBC, to Michael Powell, FCC, WC Docket No. 02-

1. *The Commission's Policy of Unregulation*

Congress's directives in the 1996 Act regarding the regulatory treatment of the Internet codify and build on well-established policies of the Commission. The Commission has consistently sought to ensure that the Internet will remain a regulation-free zone: In its own words, "[t]he Commission does not regulate internet services[.]"[13] As the Commission has said, "[w]e recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are appropriately applied to it."[14] The roots of this policy lie in the Commission's treatment of enhanced services in the *Computer Inquiries* over 20 years ago. Recognizing the enormous potential of enhanced services generally, the Commission resisted calls to regulate such services under Title II, concluding that subjecting them "to a common carrier scheme of regulation . . . would negate the dynamics of . . . this area."[15] In the Commission's view, "the absence of traditional public utility regulation of enhanced services offers the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network."[16]

The Commission's foresight in establishing a practice of regulatory restraint from the outset has enabled the Internet to get well on its way to achieving its full potential: seamless

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361 (Jan. 14, 2004). The telecommunications services at issue in that proceeding are vastly different from IP platform services, as discussed below.

13 Notice of Proposed Rulemaking, *Local Competition and Broadband Reporting*, 14 FCC Rcd 18100, 18130 ¶ 61 (1999).

14 Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11540 ¶ 82 (1998) ("*Report to Congress*").

15 Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 431-32 ¶ 123 (1980) ("*Computer II*").

16 *Id.* ¶ 7.

convergence of voice, data, and video, with an array of constantly proliferating and evolving IP platform services. Once the hobby of a few thousand computer enthusiasts, the Internet now links upwards of 665 million users.[17] And hundreds if not thousands of entities now offer Internet access and related applications.[18]

The Internet is capable of not only mirroring — and combining — the capabilities of most traditional methods of electronic communication, but also offering users a wealth of new features and functionalities that were not possible before. Voicemail can appear as an MP3 file in a user's e-mail. Telephones can be plugged into or even replaced by computers. Americans can use their computers to watch soccer matches, in real time, from halfway across the globe. Increasing numbers of users rely on "Internet radio" as an eclectic alternative to traditional broadcast radio, with equivalent or superior sound quality. And business videoconferencing can include real-time interactive file-sharing features that greatly enhance productivity. These are just tips of the iceberg: Other innovative end-user services are introduced every day. And policies that increase availability of broadband will cause such services to proliferate even faster.

The Internet's resounding success story over the past decade is the ultimate validation of the Commission's policy of regulatory restraint. As the Commission has found, "[t]he Internet

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17 *Beyond the Bubble*, The Economist at 4 (Oct. 11, 2003). One study estimated that, as of July 2003, 62% of the population in the United States used the Internet, an increase of 86% since 2000. *See* http://www.internetworldstats.com. The same study estimated that there are currently almost 680 million Internet users worldwide. *See id.* Other researchers predict that the number of Internet users worldwide will approximate 945 million in 2004 and 1.46 billion in 2007. *See* eMarketer, March 2002, available at http://www.epaynews.com/statistics/ mcommstats.html#44 (last visited July 18, 2003).

18 For example, the website www.findanisp.com currently rates over 2,700 different Internet service providers ("ISPs"). In addition, the website http://www.ecommerce1.com lists 103 Internet software providers and 287 Internet hardware providers.

and other enhanced services have been able to grow rapidly in part *because* the Commission concluded that enhanced service providers were not common carriers within the meaning of the Act."[19] As noted above, Congress adopted and codified this conclusion in the 1996 Act, finding a direct connection between the absence of regulation and the Internet's continued growth, and declaring that it was "the policy of the United States" to stay the course first set by the Commission and preserve the Internet's unregulated status.[20]

2. *The Internet Today and Tomorrow*

An understanding of the Internet's evolution generally and the operation of IP platform services in particular is essential in order faithfully to implement the congressional directive to keep the Internet "unfettered by Federal or State regulation."[21] As discussed below, IP platform services function quite differently from those provided over traditional circuit-switched networks. These functional differences have allowed the Internet marketplace to become highly competitive, making regulation of the Internet both *unnecessary* and *harmful*.

a) *The Design, Operation, and Capabilities of IP-Based Networks Differ Significantly from Those of the Traditional Circuit-Switched Network and Demand Different Regulatory Treatment.*

IP-based networks are fundamentally different from the circuit-switched network. The traditional circuit-switched network — often referred to as the "public switched telephone network," or "PSTN" — was designed, as the latter designation indicates, for a single application: voice telephony. In fact, the very nature of circuit switching makes it inefficient for

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19 *Report to Congress* at 11546 ¶ 95 (emphasis added).

20 47 U.S.C. § 230(b)(2).

21 *Id.*

other applications. Because a circuit-switched network dedicates a fixed amount of capacity (the circuit) for the duration of the communication regardless of whether information is being transmitted, it is an inefficient medium for the transmission of data traffic. Moreover, the bandwidth of a circuit-switched transmission is typically quite narrow, which precludes its use for large quantities of information that must be sent simultaneously and continuously in real-time, such as video.

IP-based networks differ radically, because their underlying technology is fundamentally different from circuit switching. IP platforms are specifically designed to handle huge quantities of information at high speeds and to transmit myriad communications of all types. The IP platform utilizes packet switching, in which all information — including voice, data, and video — is broken down into individual packets, each representing a portion of the message sent.[22] Each packet is labeled to contain information that helps it arrive at its final destination — such as its originating and terminating endpoints and the number of packets that constitute the particular

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[22] As the FCC has described:

> The Internet is a distributed packet-switched network, which means that information is split up into small chunks or "packets" that are individually routed through the most efficient path to their destination. Even two packets from the same message may travel over different physical paths through the network. Packet switching also enables users to invoke multiple Internet services simultaneously, and to access information with no knowledge of the physical location of the server where that information resides.

*Report to Congress* at 11532 ¶ 64; *see also* Memorandum Opinion and Order, *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service is a Basic Service*, 10 FCC Rcd 13717, 13718 ¶ 3 (1995).

message.[23] The packets then travel over different routes to their ultimate destination, where they are reassembled.[24]

The emergence of the suite of protocols known collectively as IP has enabled providers to fully exploit these intrinsic benefits of packetization. Pursuant to widespread voluntary agreement, IP is the universal language of the Internet. This common, open code permits communications to travel seamlessly across national and, more importantly, technological borders. The use of IP has a dramatic impact on the nature and range of services the Internet can support, as compared to what is available over the circuit-switched network:

- *First*, the universality of IP permits unprecedented interconnectivity among otherwise dispersed networks. The Internet is the end product of this interconnectivity.

- *Second*, IP permits convergence of services that have traditionally been carried on different networks. Voice, data, and video can be unified by the language of IP, enabling them to be consolidated on a single network and transmitted simultaneously, with the packets commingled until they arrive at their respective destinations. Multiple applications can thus be offered concurrently and on a tightly integrated basis. The infinite possibilities of convergence stimulate innovation in the development and combination of additional services.

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[23] *See Report to Congress* at 11531 ¶ 62 n.124 ("IP defines the structure of data, or 'packets,' transmitted over the Internet.").

[24] The FCC has stated:

> "The path of least resistance" is the fundamental theory on which the Internet was built. Invented for the sole purpose of discovering a way to get important or large amounts of data from one location to another quickly, regardless of failures or delays in traditional communications networks, data packets over the Internet will take any path that does not resist transfer. The path of least resistance is not always the shortest path, but for data, it is the most reliable path for the mass transfer of data.

Fifth Annual Report, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 24284, 24320-21 ¶ 58 n.242 (1998).

- *Third*, packetization, together with the continually improving labeling functions of packet networks, permits calls to be transported more efficiently. The network can distribute the individual packets making up a particular message across different paths, and can route them dynamically in ways that avoid any problems in the network.

- *Finally*, the flexibility that is inherent in the IP platform gives end users unprecedented control over the services they receive. Customers can interact with stored data on a provider's network to customize their services to accommodate business, network, or other needs, integrating multiple applications as desired and according to their specific bandwidth and capacity requirements, in ways that are simply not possible over the circuit-switched network.

The rich variety of new service options available over IP platforms are possible precisely because of the characteristics that distinguish those platforms from the circuit-switched network. The IP platform is an overlay network, consisting of its own routers and IP-enabled facilities, that has been built separate and discrete from the circuit-switched network and traditional Asynchronous Transfer Mode ("ATM") and frame relay networks. In contrast to the circuit-switched network, the Internet is highly "modular," in that particular providers can and do specialize in supplying services on one layer without supplying services on another, and can compete effectively in doing so. The openness and modularity of the IP platform enable non-facilities-based providers of all types to offer services over the networks of others. As a result, the IP platform is itself dispersed and highly competitive, consisting of individual IP networks that operate independently of each other yet peer and interconnect with each other in individually tailored ways.

The technological differences between the traditional circuit-switched network and the IP platform bear directly on the manner in which these networks can and should be regulated. Because the circuit-switched network historically supported a single application — voice telephone calls — that service, and the network over which it was provided, were subjected to an essentially service-specific regulatory regime under Title II of the Act. This approach found

itself echoed in other service-specific regulatory "silos," such as Title III (and Title II) for wireless voice and data traffic, and Title VI for cable-based video service. But the technology underlying IP-based networks, and the ability of such networks to converge services, defy such segregation. As noted, IP networks integrate multiple services into a single bitstream, making it virtually impossible to know which packets relate to which application. As a result, the service and network categories on which traditional regulation was based cannot practically be applied in an IP world.

b) *The Internet is a Competitive Marketplace that Operates Without Regulatory Intervention Today.*

As a result of the Internet's open architecture and independence from traditional legacy networks, the Internet is characterized by low barriers to entry and an absence of market power that make regulation decidedly unnecessary. The nondiscriminatory quality of the Internet's open-standards architecture means that *any* entity can provide IP platform services simply by acquiring the necessary routers and links between them. As a result of the ease with which new participants can enter this marketplace, the Internet has evolved as a highly competitive, dispersed, and egalitarian "network of networks" — as its very name indicates.[25] These networks are operated by carriers and noncarriers alike, including governments, academic entities, and large and small private businesses.

Indeed, new and often "nontraditional" entities regularly enter the IP platform services market, setting up managed networks that serve their own or their customers' needs but which

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[25] Memorandum Opinion and Order, *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd 18025, 18105 ¶ 144 (1998) ("*WorldCom/MCI Merger Order*").

are interconnected with the "public" Internet. These entrants include equipment manufacturers, software companies, and other "noncarriers."[26] In this respect, the Internet stands in sharp contrast to the legacy circuit-switched and cable networks, each of which historically was owned by one provider that supplied most or all of the necessary facilities and services.

The modularity of IP-based networks and of the services and applications that ride on them enables competitors to enter the market at a variety of levels. Some providers focus their business plans on developing computer hardware or software, while others concentrate on the provision of discrete services such as backbone transport, Internet access, or specialized interactive content. The Commission itself has recognized that the market includes Internet access providers, application providers, content providers, and backbone providers, each of which specializes in a different aspect of Internet communications.[27] Many of these entities enter into partnerships in which each member provides one aspect of a service needed to meet a

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[26] For example, the Commission has noted that several mobile data providers "offer — either directly to individual consumers or to enterprise customers to implement for their employees — the ability to access on a mobile device company intranets and files stored on corporate servers," allowing customers to establish virtual private networks. Eighth Report, *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 18 FCC Rcd 14783, 14856 ¶ 167 (2003). Likewise, manufacturers of handheld devices such as Palm Pilots and Blackberrys have teamed up with Internet access providers to give their customers wireless Internet access. *See* Sixth Report, *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 16 FCC Rcd 13350, 13413-17 (2001).

[27] *See generally Report to Congress* at 11531 ¶ 62.

user's communications needs.[28] Often, these entities are customers of each other.[29] These attributes account for the very low concentration in the Internet marketplace. The Internet, and all the varied applications offered over it, show no signs of domination by the operators of the legacy wireline networks traditionally subject to Title II regulation; to the contrary, "[t]he Internet is a loose interconnection of networks belonging to many owners."[30] Indeed, incumbent telecommunications operators are at most secondary players in this market.

The cooperative arrangements through which multiple players provide IP platform services were established in the open market, *without* government regulation. For example, multiple Internet backbones are connected through either peering or transiting arrangements — private contractual arrangements by which Internet backbone providers exchange traffic.[31] As the Commission has recognized, these arrangements have proliferated notwithstanding that Internet backbone providers "compete with one another for ISP customers"; indeed, in order to remain competitive, "they must also cooperate with one another, by interconnecting, to offer their end users access to the full range of content and to other end users that are connected to the

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[28] For example, ServInt provides Internet access and backbone services, but it partners with various software and content providers in order to provide expanded Internet services to its customers. *See* http://www.servint.net/partners/network/index.html.

[29] For example, Aleron is a provider of Internet backbone services that counts many Internet service providers among its customers. *See* http://www.aleron.com/info/.

[30] *Report to Congress* at 11531 ¶ 62.

[31] *See* Michael Kende, *The Digital Handshake: Connecting Internet Backbones*, Office of Plans and Policy, OPP Working Paper No. 32, Federal Communications Commission at 4-8 (Sept. 2000); *WorldCom/MCI Merger Order* at 18105 ¶ 144. Peering arrangements and transiting arrangements differ in that, under the former, the providers do not charge each other for terminating traffic and will terminate only each other's traffic (and not that of a third-party provider). *See id.* at 18105-06 ¶¶ 145-46.

Internet."[32] As a result of these voluntary arrangements, the Commission concluded, "the Internet backbone is currently growing at an exponential rate."[33] Similarly, in discussing the regulation of cable modem service, the Commission noted that the many business relationships on which the Internet relies "are still evolving through negotiations and commercial decisions."[34]

c) *The Internet's Future Evolution Depends on Continued Unregulation of IP Platform Services.*

Regulation of IP platform services not only is unnecessary, but also would be affirmatively harmful to the continued development of the Internet as the communications mode of the future. The Commission has recognized that, as compared to regulation,

> [c]ompetitive markets are superior mechanisms for protecting consumers by ensuring that goods and services are provided to consumers in the most efficient manner possible and at prices that reflect the cost of production. Accordingly, where competition develops, it should be relied upon as much as possible to protect consumers and the public interest. In addition, using a market-based approach should minimize the potential that regulation will create and maintain distortions in the investment decisions of competitors as they enter local telecommunications markets.[35]

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32 *WorldCom/MCI Merger Order* at 18105 ¶ 144.

33 *Report to Congress* at 11533-34 ¶ 68.

34 Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, 4818 ¶ 30 (2002) ("*Cable Modem Order*"), *rev'd on other grounds sub nom. Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

35 First Report and Order, *Access Charge Reform*, 12 FCC Rcd 15982, 16094 ¶ 263 (1997); *see also, e.g.*, Report and Order, *Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)*, 95 F.C.C.2d 1276, 1301 ¶ 38 (1983) ("Regulation often can distort the workings of the market by imposing costs on market participants which they otherwise would not have to bear. . . . [T]he advent and growth of competition in a particular market eliminates the need for continued regulation.").

Government intervention is particularly undesirable in the Internet context, because the market is not only highly competitive but extremely dynamic. It was for this reason that the Commission refrained from regulating the Internet backbone; as the Commission observed, "The technology and market conditions relating to the Internet backbone are unusually fluid and fast-moving, and we are reluctant to impose any regulatory mandate that relies on the persistence of a particular market model or market structure in this area."[36] Regulation is incapable of keeping up with the rapid pace of transformative change that the Internet has brought to electronic communications generally.[37]

One manifestation of the dynamic nature of the Internet is the rapid and continuing erosion of any distinction between the public Internet and customer-specific, "managed" IP networks. Today, customers rely on managed networks to address the quality of service ("QoS") limitations that stem from what may be regarded as the "best effort" capabilities of the public Internet. To a large extent, the interconnected IP platforms making up the public Internet have operated without guarantees regarding how quickly or reliably information will reach its destination. As a result, today's public Internet often delivers traffic however it can without assurances of dedicated bandwidth, traffic prioritization, or differentiation between applications or between users that require particular service parameters. While these "best effort" capabilities

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[36] *Report to Congress* at 11535-36 ¶ 72. As discussed below, however, merely because a telecommunications service is transported over an Internet backbone for some distance does not mean that the service is exempt from certain obligations when it originates or terminates on a traditional telecommunications network.

[37] *See* "FCC Cable Chief Says 'Open' Internet is Primary Goal — Cites Agreement of Consumers and Industry," News Release (rel. 1999) ("To regulate [the Internet] at this juncture would be to say that the market has failed before the market has been given a chance.").

are perfectly suitable for certain types of Internet traffic — such as e-mail, file transfer, and other data applications that are not sensitive to packet loss or delay — these limitations are much more likely to impede higher-level applications: Voice and video traffic, for example, cannot tolerate the same degree of delay as data traffic. Managed networks have avoided this problem by allowing for the active management of traffic flows in a way that meets the particular requirements of different types of traffic and different end users.

But a variety of technologies for delivering QoS on the *shared* network are rapidly being introduced. QoS will allow IP platform services on the public Internet to become increasingly dynamic, user-specific, and customer-driven, thus eliminating relevant distinctions between managed and public networks.[38] And managed networks are increasingly linked to the public Internet. Developments such as these occur more quickly than regulators can anticipate, and any attempts to draw regulatory distinctions between, for example, "public" and "managed" IP networks would be obsolete before the ink was dry on the regulations.

In short, any attempt to impose regulation in this area would inevitably lag behind the newest developments and technological applications. That regulatory drag would discourage the

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[38] *See* Alice Mack, *Carrier-Class in an IP World, available at* http://www.iec.org/cgi-bin/acrobat.pl?filecode=226. There are various solutions under development. For example, Integrated services ("IntServ") uses explicit signaling whereby a given application requests a specific kind of service or resources it needs from the IP network before it sends the data. Under differentiated services ("DiffServ"), each packet is marked so as to determine the behavior that each hop in the path must support so that no packet has to wait. Packets assigned to a given class of service are provided the same treatment at each node or router over each hop such that the per-hop behavior is predetermined. With Multiprotocol Label Switching ("MPLS") (a draft networking standard that is not yet finalized), packets are assigned a "label," and special MPLS-compatible routers then assign the packets priority and routing based on the contents of the label. This allows network operators to guarantee the needed level of performance and route around network congestion.

innovation and new investment that are essential to the Internet's growth. As Commissioner Abernathy has cautioned:

> [I]t is important that we also act as technology facilitators — that is — we must recognize and reduce regulatory barriers to entry for emerging technologies through the adoption of policies that tap the benefits of emerging technologies. . . . [W]e should enact rules that allow free market forces to decide whether a particular technology succeeds or fails. In this manner, the market will dictate the success of technologies, not regulators.[39]

Similarly, as Chairman Powell remarked at the Commission's recent forum on voice-over Internet Protocol ("VoIP") telephony, "No regulator, either federal or state, should tread into this area without an absolutely compelling justification for doing so. Innovation and capital investment depend on this premise. The entrepreneurs seated before us depend upon this premise."[40] And Commissioner Copps noted at the VoIP forum that "[w]e are dramatically changing the way we communicate in this country, and around the globe, and we are challenged to adjust our policies and rules not only to accommodate, but to facilitate, this process of change."[41]

Maintaining the government's hands-off approach is critical to ensure the continued flow of money and new ideas into the Internet marketplace, and thus the success of this technology. Indeed, the Commission has repeatedly noted that it can "encourage investment and innovation

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[39] FCC Commissioner Kathleen Q. Abernathy, "The Importance of the Market," 3G Americas Board Briefing (June 3, 2003).

[40] "Opening Remarks of FCC Chairman Michael K. Powell at the FCC Forum on Voice over Internet Protocol (VoIP)," News Release (rel. Dec. 1, 2003) ("*Powell VoIP Forum Remarks*").

[41] "Opening Remarks of Commissioner Michael J. Copps, Voice over Internet Protocol Forum," News Release (rel. Dec. 1, 2003) ("*Copps VoIP Forum Remarks*").

by reducing regulatory obligations."[42] The Commission has recognized that broadband "should exist in an environment that eliminates regulations that deter investment and innovation and recognizes rules that promote competition and minimize harmful interference."[43] That approach requires firmly establishing that IP platform services will remain unregulated.

3. *The Threat to Unregulation*

The innovation and investment that are essential to the Internet's growth are currently being threatened. While the Commission's deregulatory approach to the Internet is widely acknowledged and its success universally recognized, this policy has come under siege in a variety of forums, including state commissions, state legislatures, courts throughout the United States, and even the Commission itself. As higher quality IP platform services emerge and begin substituting for legacy communications services, decisionmakers are increasingly being asked to shoehorn the former into regulatory models created for the latter. But those models were designed for an earlier era in which communications technologies and services tended to be vertically integrated rather than integrated across and between various platforms, and where there were real concerns about a single provider's market power because entry was neither open nor modular. As noted, IP platform services present no such concerns.

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[42] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 16999-17000 ¶ 22 (2003) ("*Triennial Review Order*") (quoting Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3705 (1999)).

[43] Notice of Proposed Rulemaking and Memorandum Opinion and Order, *Amendment of Parts 1, 21, 73, 74, and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, 18 FCC Rcd 6722, 6740-41 ¶ 34 (2003).

Regulatory issues relating to IP platform services are being raised in a patchwork of discrete, service-specific proceedings, in the courts and in the states, that can obscure and complicate larger issues about the appropriate regulatory treatment of the Internet. In one court decision that is likely to be challenged in other jurisdictions, for instance, a federal district court in Minnesota recently reversed an order of the Minnesota commission, and concluded that Vonage's VoIP is an "information service" under the Act and thus insulated from state telecommunications regulation.[44] Meanwhile, in *Brand X*, the Ninth Circuit upset one of the Commission's few definitive rulings involving IP platform services, rejecting the Commission's determination that cable modem services are "information services" exempt from Title II regulation.[45]

The *ad hoc* character of these court proceedings is mirrored at the state agency level. At least 18 states have begun taking positions on the regulatory classification and treatment of specific VoIP services or have been asked to do so. In recent months, public service commissions in Minnesota, Wisconsin, and California took steps to subject providers of such services to regulations applicable to traditional telephone companies.[46] Other states — including

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[44] *See Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 994 (D. Minn. 2003) (permanently enjoining the Minnesota Public Utilities Commission from regulating Vonage as a telecommunications carrier under state law). Issues relating to Internet-based services also will eventually be presented to federal courts in appeals from state public service commission determinations under section 252, as carriers seek to define how the unbundled network element ("UNE") and reciprocal compensation rules apply.

[45] *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

[46] *See* Order Finding Jurisdiction and Requiring Compliance, *Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp. Regarding Lack of Authority to Operate in Minnesota*, Docket No. P-6214/C-03-108 (Minn. Pub. Utils. Comm'n Sept. 2003); *California Joins VoIP Regulation Party*, Broadband Business Report (Oct. 7, 2003) (noting that

Alabama, Colorado, Illinois, Michigan, Missouri, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Virginia, and Washington — are investigating whether to take similar action, either on their own initiative or at the request of a specific party.[47] In addition to these activities by state public service commissions, at least two state legislatures — Florida and Pennsylvania — have passed or are considering passing laws concerning regulation of VoIP.[48]

Despite this activity in the courts and in the states, there can be little dispute that the Commission remains the appropriate leader in the area of Internet policy. Indeed, the disparate efforts described above should not be construed as a challenge to the Commission's authority over the Internet generally so much as they represent an attempt to fill in the gaps that have arisen as technology continues to evolve and generate yet more IP platform services. This frenzy of activity also serves as a call to action to the Commission. The Commission should not abdicate leadership to these dispersed forums, where decisionmakers lack the Commission's oversight of, and vision for, the industry as a whole.

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the California commission sent letters to six providers of VoIP requiring them to comply with state regulations governing telecommunications services); *Wisconsin Decides VoIP Getting Too Big to Ignore*, Broadband Business Report (Sept. 23, 2003) (noting that the Wisconsin commission, without a hearing, sent a letter to at least three providers of VoIP directing them to comply with state regulations applicable to telecommunications carriers).

47 *See* Alan Breznick, *States Weigh Regulating VoIP As Traditional Phone Service*, Cable Datacom News (Oct. 1, 2003); Peter Lewis, *Rules for Internet telephony challenge regulators; Is it telecommunications or information services?*, Seattle Times, at C1 (Oct. 13, 2003) (describing recent proceedings initiated in Washington state and Oregon); Margaret Boles, *Missouri PSC Considers Opening Proceeding on VoIP*, Telecommunications Reports Daily (Oct. 20, 2003); Gayle Kansagor, *VoIP Debate Moves to North Dakota*, Telecommunications Reports Daily (Dec. 8, 2003).

48 Fla. Stat. Chs. 364.01(3), 364.02(12) (2003); S. 900, Gen. Assem. 2003 Sess. (Pa. 2003).

Prompt action by the Commission is particularly needed because inaction or delay complicates later efforts to address the regulatory treatment of IP platform services as a unified whole. The *Brand X* decision is a cautionary case in point. The Ninth Circuit there vacated the Commission's statutory characterization of cable modem service because it felt compelled to follow its prior holding on a related issue in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). The court explained that the Commission had ceded its institutional role on this issue when, at the time of the *Portland* litigation, it "ha[d] declined, both in its regulatory capacity and as amicus curiae, to address the issue before us."[49] It will be likewise insufficient for the Commission to make policy in this area on a purely reactive and piecemeal basis, assessing each new service or application in isolation as it is introduced — a tendency recently described by Chairman Powell as "regulating by accident."[50] The Commission will be pulled increasingly into that course, however, unless it acts now to address IP platform services as a whole.

The regulatory uncertainty that has grown as a result of the Commission's silence threatens to halt the Internet success story in its tracks. Providers of IP platform services have long understood themselves to be unregulated; indeed, as noted above, all sorts of noncarrier entities operate or are considering operating IP-based networks, and these entities have never anticipated suddenly becoming subject to common carrier economic regulations as a result. Yet the raft of disparate regulatory and judicial proceedings threatens to subject them to regulatory obligations that would not be easy to fulfill and that might radically affect their economics.

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[49] *Brand X*, 345 F.3d at 1131 (quoting *Portland*, 216 F.3d at 876).

[50] Brian Hammond, *Powell Wants Comprehensive Look at Internet Policy, Sees Need for Bigger Federal Role*, Telecommunication Reports Daily (Oct. 14, 2003) ("*Powell Internet Remarks*").

Many providers could be swept up in regulatory initiatives and developments unintentionally, because, as discussed above, the Internet precludes bright-line distinctions among providers and networks; the effects will be just as harmful even if regulators do not intend them. As the Commission has repeatedly recognized, regulatory uncertainty undermines the incentives of all prospective providers to design and deploy new offerings that exploit the Internet's potential as a mode of communications. Most recently, Chairman Powell stated, "As the Internet continues to command a central position in communications and in commerce, the lurching assertions of different regulatory regimes could threaten its very viability and could severely, if inadvertently, undermine the efficient development of national economic opportunity."[51] By contrast, "a stable and predictable federal regulatory environment . . . is conducive to continued investment . . . and minimiz[es] regulatory uncertainty and any consequent chilling of investment activity."[52]

The Internet environment is now awash with confusion among both consumers and investors. Commissioners Copps's observations about VoIP are equally applicable to IP platform services generally:

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51 *Id.*

52 Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1421 ¶ 25 (1994); *see also Cable Modem Order* at 4802 ¶ 5 ("[W]e seek to remove regulatory uncertainty that in itself may discourage investment and innovation."); Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, 3022 ¶ 5 (2002) ("*Title I NPRM*") (the Commission's "policy and regulatory framework will work to foster investment and innovation in these networks by limiting regulatory uncertainty and unnecessary or unduly burdensome regulatory costs"); *Triennial Review Order*, Separate Statement of Chairman Michael K. Powell at 17519 (the absence of "clear and sustainable rules" may result in "a molten morass of regulatory activity that may very well wilt any . . . investment interest . . . .").

> Question marks have haunted VoIP for too long. Consumers are confused. They need to know what they can expect if they sign up for this new service. Investors and carriers are wary. They need to know in this capital intensive industry how to plan for the networks of the future. I think we all understand that we do no favors to anyone if we sit back and practice benign neglect. It's both pro-consumer and pro-business for the Commission to bring clarity to this dialogue.[53]

In Commissioner Adelstein's words, "It's time for us to take the lead in getting the regulatory structure right from the start. We should provide clarity and guidance for all who are entering or thinking to enter this space . . . ."[54] The Commission should establish this clarity now by declaring affirmatively that IP platform services are categorically exempt from legacy economic regulation.

## SCOPE OF PETITION

To implement Congress's expansive mandate "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services,"[55] the Commission will first need to describe the scope of the services that fit under its umbrella of unregulation. Nearly a quarter century ago in the *Computer Inquiries*, the Commission recognized the wisdom of establishing a broad category of services that need not, and should not, be subject to traditional regulation.[56] By doing so, the Commission eschewed a time-consuming,

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53 *Copps VoIP Forum Remarks.*

54 "Statement of Commissioner Jonathan S. Adelstein, Voice over IP Forum" (rel. Dec. 1, 2003).

55 47 U.S.C. § 230(b)(2).

56 *See Computer II* at 423 ¶ 101 (recognizing the benefits of "draw[ing] a clear and . . . sustainable line . . . upon which business entities can rely in making investment and marketing decisions" and "remov[ing] the threat of regulation from markets which were unheard of in 1934 and bear none of the important characteristics justifying the imposition of economic regulation by an administrative agency.").

case-by-case regulatory approach, and instead gave the communications industry a relatively stable, well-defined regulation-free zone within which to develop innovative new products and services that have provided incalculable economic and social benefits to our nation.

In this section of the petition, we identify the scope of the services that should be subject to unregulation in the Internet era. This category of services (and the underlying IP platforms) — which we refer to collectively as "IP platform services" — fits squarely within Congress's vision that the "Internet and other interactive computer services" should exist "unfettered by Federal or State regulation."[57] We begin with a brief description of the key principles that guide our formulation of the scope of IP platform services. We next provide a specific description of these services, as well as the providers who offer them and the platforms over which they are provisioned. We then discuss some examples of the services that should be considered IP platform services and, just as important, the services that should not.

In identifying the scope of IP platform services, we are also mindful of the Commission's need to achieve important public policy goals, such as promoting universal service, public safety, assistance to law enforcement, and disability access. As explained further below, we believe that our proposal will allow the Commission to fence IP platform services off from unnecessary legacy regulations while leaving the Commission with solid authority to continue to meet its

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[57] Congress defines the Internet broadly in the Act. *See* 47 U.S.C. § 230(f)(1) (defining the Internet as "the international computer network of both Federal and non-Federal interoperable packet switched data networks"); *id.* § 230(f)(2) (defining interactive computer service to include "any information service, system, or access software provider . . . including specifically a service or system that provides access to the Internet . . . ."); *id.* § 231(e)(3) ("The term 'Internet' means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information.").

critical policy goals as the communications industry evolves towards pervasive reliance on the IP format.

1. *Principles Guiding the Definition of IP Platform Services*

In describing the scope of IP platform services, the Commission should follow three key principles: (a) the defined category should be broad and inclusive; (b) it should have bright-line boundaries; and (c) its definition should be competitively neutral. Each of these principles is discussed below.

a) *Broad Scope*

As mentioned above, unlike the closed, circuit-switched world of the past, the competitive IP world of today allows a multitude of services to flow seamlessly over a single IP platform. An individual IP packet could be part of a web page, an e-mail, a music video, a voice transmission, or some other form of communication. Thus, the scope of IP platform services should be broad enough to encompass the full range of services that ride the IP platform so as to be faithful to Congress's vision that the Internet and other interactive computer services shall exist unfettered by federal or state regulation.[58]

If the scope of IP platform services subject to nonregulation were to be narrowly prescribed to exclude a particular IP service, which would then be subjected to traditional economic regulations, those regulations would invariably affect all of the other services sharing the IP platform. There is no practical and efficient way to segregate individual IP packets for

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[58] *See* 47 U.S.C. § 230(b)(2).

individualized regulatory treatment.[59] Thus, to provide a meaningful opportunity for experimentation, innovation, and growth, the Commission should define IP platform services broadly and inclusively.

b) *Bright-Line Boundaries*

Perhaps the most significant concern expressed recently by the communications industry is the lack of certainty surrounding the regulatory treatment of new products and services — uncertainty that currently is increasing, as described above. This lack of regulatory certainty slows business decisionmaking, impedes investment, increases costs, and can delay or even prevent the introduction of new products and services into the marketplace. By contrast, the creation of an unregulated space for IP platform services with bright-line boundaries that are clearly articulated and easily understood would provide the industry with a stable foundation on which to attract capital and develop innovative services.

Bright-line boundaries for IP platform services also would substantially reduce the need for the Commission to spend its limited resources in multiple case-by-case regulatory determinations each time a new IP platform service is introduced or a new "bell or whistle" is added to an existing service. Thus, the scope of IP platform services should avoid reliance on fine technical distinctions that may rapidly become obsolete as communications technologies continue to evolve. Rather, the definition of IP platform services should feature an easily

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[59] Even if it were practical to check individual packets to determine which ones were VoIP packets, that would still subject the non-VoIP packets to an inspection, and to the attendant performance degradation associated with that inspection, merely because they ride the same platform as the VoIP packets.

understood functional description of the services' key attributes so that providers and regulators alike can tell when a given service qualifies as an IP platform service.

c) *Competitive Neutrality*

One of the greatest attributes of the Internet is the open competition it has fostered among communications services and providers that once resided in isolated regulatory silos. As described above, the Internet marketplace and, more broadly, the market for services that run on IP, are characterized by low barriers to entry and high levels of competition. Service providers of all shapes and sizes compete fiercely without the need for government intervention. To maintain this intense and highly productive competition, the scope of IP platform services must be defined without regard to outdated legacy distinctions between service providers or the services they seek to offer. The market for IP platform services should be open to all competitors, who should all be subject to the same regulatory treatment in the provision of these services.

As described above, the highly modular nature of the Internet enables service providers to focus on one specific aspect of IP services (such as software). This presents end users with varied choices between (i) obtaining particular components (*e.g.*, software, customer premises equipment ("CPE"), broadband services) from individual providers and managing their own networks, or (ii) purchasing wholly or partially assembled IP platform services from one or more service providers. Regulatory treatment of the service capabilities the end user obtains should be neutral as between these choices.

Further, the Commission should reaffirm that participants in the Internet marketplace will enjoy no special regulatory advantages or disadvantages because of their status as "carriers" or as noncarrier suppliers of software, equipment, or services. Today, for example, all Internet

backbone providers are treated equally with respect to the "unregulation" of the Internet — even if they are also providers of legacy telecommunications services — and this is as it should be. Even if it were possible to draw lines among providers, the impact would be disruptive and unworkable. Consider, for example, the increased uncertainties and added complexities that would be associated with establishing customized QoS capabilities across multiple IP networks if one provider were subject to requirements or constraints to which the others are not. This would diminish the existing flexibility of network providers to tailor new arrangements. It would also ultimately either put the government in the position of regulating the Internet as a whole, or make it impossible to ensure interoperability: In order to ensure the same level of QoS across the entire path of an Internet communication, all providers would have to engineer and design their facilities and services to meet standards imposed on the subset that is targeted for regulation, or that subset would be shut out entirely, because it would be unable to participate in the QoS standards adopted by the rest of the industry. Thus, regulating one group or portion of the Internet will result in the regulation of all of them, or the severing of the regulated subset from the market.

2. *IP Platform Services*

a) *Scope of Services, Providers, and Platforms*

Consistent with these principles, the Commission should declare that "IP platform services" consist of (a) IP networks and their associated capabilities and functionalities (*i.e.*, an IP platform), and (b) IP services and applications provided over an IP platform that enable an end user to send or receive a communication in IP format. The communication may be voice, data, video, or any other form of communication, so long as it is sent to or received by an end user in IP over an IP platform. This definition is expansive in that it encompasses the IP

networks themselves and the uses to which these networks are put. It also encompasses both "services" and "applications," since the distinctions between these concepts are meaningless for regulatory purposes in the IP context. Instead, the key characteristic of an IP platform service is that the service must leave or reach the customer in IP over an IP platform.

A ruling that encompasses not only IP-based services but also the IP-enabled networks over which they are provided is necessary in order to create a rational, deregulatory framework for the Internet. The Internet is, at bottom, a collection of IP platforms. The quality and range of IP-based services are directly linked to those underlying platforms. As a result, Title II regulation of those networks would necessarily affect the myriad products, services, and applications that are part and parcel of these IP platforms, and vice versa. In fact, because the IP routers and facilities used for IP-based services are also often used for the "best efforts" public Internet, regulation of individual IP-enabled networks and subnetworks could quite possibly lead to regulation of the Internet as a whole. It also is important, as noted, not to establish artificial distinctions based on whether an IP service provider is a network-based or an application-based provider.

Furthermore, the Internet's future development is dependent on innovation at *both* the service and the facility levels. Therefore, the Commission must ensure that IP-based services as well as the IP-enabled facilities over which they are provided are allowed to evolve without regulatory restraint. This action is necessary to promote IP technology integration and evolution at both the network and service levels. Any other approach would simply be incomplete, and would not permit the full potential of IP platform services to be realized.

The touchstone for identifying IP platform services should be that the service reaches or leaves the end user in IP format. This focus on the functionality afforded the end user is

consistent with the Commission's repeated recognition that the regulatory treatment of a particular service turns on the nature of the service as delivered to the end user.[60] IP platform services are fundamentally characterized (and distinguished from traditional legacy services) by the fact that they are either sent to or received by an end user in IP format. It is only in these circumstances — and not when an end user receives a communication in circuit-switched format — that the end user can tap into the enormous functional capabilities of the IP platform. The Commission's definition of these services therefore should account for this defining feature of IP platform services.

The Commission also should make clear that IP platform services include the relevant offerings provided by *any* type of communications provider, including telephone companies, cable companies, wireless providers, satellite companies, powerline companies, ISPs, or any other type of entity (whether or not a "carrier"). These providers should be free to choose to offer IP platform services on an individualized basis to a select group of customers, or they may offer services indiscriminately to any customer. And they may use any type of IP facilities or networks to do so, without changing the regulatory classification of the IP platform service. Nor should it matter whether the provider uses copper, coaxial cable, fiber, spectrum, or any other medium. As long as the service provided affords the customer the ability to send and/or receive communications in IP, the service should be treated as an IP platform service.

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60 *See, e.g., Report to Congress* at 11530 ¶ 59 ("[I]f the user can receive nothing more than pure transmission, the service is a telecommunications service. If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service."); *see also* 47 U.S.C. § 153(20) (defining an information service based on what "capability" is "offer[ed]").

As discussed above, the Commission also should resist calls to distinguish between IP platform services that ride over the "public" Internet on the one hand and "managed" IP networks on the other.[61] That distinction is already vague and will become increasingly meaningless in coming years. As explained, the principal distinction between a "public" and a "managed" IP network has been the latter's greater ability to manage traffic flows and thereby provide QoS guarantees to the user.[62] The distinction between "public" and "managed" IP networks will blur or disappear as improved QoS capabilities increasingly allow the creation of virtual private networks on the public Internet. Any attempt to base regulatory distinctions on a supposed public/managed dichotomy would almost certainly become obsolete as technology continues to develop. And, as with differentiating between types of carriers, regulations and distinctions among networks either would be impossible to sustain, leading to regulation of all networks, or would isolate one type of network from others, thus destroying the interoperability and seamlessness that are hallmarks of the Internet.

b) *Examples of IP Platform Services*

A quintessential example of an IP platform service is an IP-based virtual private network ("IP-VPN") — a service that allows a user to realize the cost advantages of a shared IP network, while enjoying the same security, reliability, QoS, and manageability as if operating its own

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61 *See Cable Modem Order* at 4799 ¶ 1 n.1 (defining "the Internet" to include any IP information system that "provides, uses or makes accessible, *either publicly or privately*, high level services layered on the communications and related infrastructure described herein") (emphasis added); *Report to Congress* at 11531-32 ¶ 63 ("many of the networks connected to the Internet are 'intranets,' or private data networks, that offer better performance or security to a limited set of users, but can still communicate with the Internet using IP").

62 The routers and links used to provide "best efforts" services over the public Internet are in many cases the same routers and links used to provide managed IP services.

network. An IP-VPN service is delivered to the customer in IP format. IP-VPN capabilities can be provided through CPE or via an IP service provider's network, illustrating again why it is important not to differentiate between technological solutions. Another classic example of an IP platform service is a VoIP service provided over a broadband connection that enables the calling party to send its communication in IP.[63]

In addition to enabling a customer to communicate with other IP platform service subscribers, some IP platform services may enable a customer to communicate with a user of a *non*-IP platform service, for example, a subscriber to plain old telephone service on the PSTN. In these situations, the "calling" customer's IP communications will have to be converted at some point to a non-IP format before they can be delivered over the PSTN. The IP platform service used to send the communication remains an IP platform service despite this conversion. At the same time, as soon as a communication is handed off to the PSTN, the rules applicable to PSTN communications should apply.[64]

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[63] Broadband Internet access service is yet another example of an IP platform service. By purchasing broadband Internet access service — in the form of cable modem service, digital subscriber line service, satellite broadband service, wireless broadband service, or any other broadband service — a customer obtains the ability to communicate with others in IP. The customer may browse the world wide web, send and receive e-mail, download and upload files, and engage in countless other communications all sent and received by that customer in IP.

[64] By the same token, if the service provided to the customer is a PSTN service at both ends, and the customers on each end are not provided the ability to send and/or receive communications in IP, then the service is not an IP platform service, even if the service provider uses IP transparently in the provision of the service. For example, if a service provider offered non-IP platform services to two customers but transparently converted all traffic to IP for transmission on its own IP platform, the intermediary IP transmission does not change the nature of the non-IP platform services provided to the two customers. The same result would hold if the intermediary IP transmission were performed by a third party.

These are just a few examples of the IP platform services available today or likely to be available in the future. As the use of IP continues to grow, new IP services will be developed, new IP platform architectures will be designed, and new business relationships will be formed between providers of IP platform services. Rather than wait to address these services on a piecemeal, case-by-case basis, the Commission should affirmatively declare that, consistent with Congress's vision, a broad, bright-line, and competitively neutral category of IP platform services will be permitted to flourish "unfettered by Federal or State regulation."

## DISCUSSION

In order to determine the proper regulatory treatment for any new service, the Commission must first ask whether that service is subject to its jurisdiction under Title I, which covers all "interstate communications." If a service qualifies as an interstate communication and thus falls within the Commission's exclusive jurisdiction under Title I, the Commission must then ask whether that service also meets any of the criteria that would subject it to any of the additional substantive Titles of the Act — Title II for telecommunications services, Title III for broadcast and other services using the radio spectrum, and Title VI for cable services.

Under this analytical framework, IP platform services clearly fall into the Commission's exclusive jurisdiction under Title I, because they are categorically "interstate" in character and are "communications by wire" or "by radio." The Commission thus may preemptively oversee IP platform services under Title I, and may apply any public policy regulations it finds necessary under that framework. The Commission should declare that IP platform services do not fall within Title II or any other substantive Title in the Act, even though certain service applications may share some attributes with services that fall within those Titles. Further, to eliminate all uncertainty about the unregulated status of IP platform services, the Commission should exercise

its authority under Section 10 of the Communications Act to forbear from any Title II regulation that might be argued to otherwise apply to these services or particular applications of them, including specifically the *Computer II* requirements.[65]

## I. THE COMMISSION SHOULD CONFIRM THAT IP PLATFORM SERVICES ARE CATEGORICALLY INTERSTATE COMMUNICATIONS AND ARE THUS SUBJECT TO THE COMMISSION'S EXCLUSIVE JURISDICTION UNDER TITLE I.

IP platform services are communications by wire or radio that, by virtue of the dispersed nature of the Internet itself, are inherently interstate. It is practically infeasible, if not impossible, to identify a segregable intrastate component of a communication provided using an IP platform service. As a result, IP platform services fall within the Commission's exclusive regulatory jurisdiction under Title I of the Act. To the extent certain public policy objectives must be met in connection with IP platform services, the Commission has the authority to impose individual regulatory requirements on IP platform services under Title I.

### A. IP Platform Services Are Inherently Interstate Communications by Wire or Radio, With No Identifiable Intrastate Component.

The Communications Act gives the Commission broad jurisdiction over "all interstate and foreign communication by wire or radio."[66] The Act defines "communication by wire" as "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services . . . incidental to such

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65 As noted above, SBC has separately filed a petition for forbearance as required by 47 C.F.R. § 1.53.

66 47 U.S.C. § 152(a).

transmission," and "communication by radio" as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission."[67] As discussed above, the myriad IP platform services fit one or the other or both definitions.

As the Commission has consistently recognized, the Internet itself is inherently interstate. The Internet is "an international network of interconnected computers enabling millions of people to communicate with one another and to access vast amounts of information from around the world."[68] Applications provided over the Internet "involve computers in multiple locations, often across state and national boundaries."[69] As a result, "In a single Internet communication,

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67 *Id.* §§ 153(52), (33).

68 Memorandum Opinion and Order, *GTE Telephone Operating Cos.*, 13 FCC Rcd 22466, 22468 ¶ 5 (1998) ("*GTE Order*"); *see also Cable Modem Order* at 4799 ¶ 1 n.1 (defining "the Internet" as a "global information system"). The Commission in the *Computer Inquiries* reached a similar conclusion that enhanced services generally constitute the transmission of signals "over the interstate telecommunications network and, as such, fall within the subject matter jurisdiction of this Commission." *Computer II* at 432 ¶ 125.

69 Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd 9151, 9178 ¶ 58 n.115 (2001) ("*ISP Remand Order*"), *remanded sub nom. WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied sub nom. Core Communications, Inc. v. FCC*, 123 S. Ct. 1927 (2003). For example, a "single web address frequently results in the return of information from multiple computers in various locations globally":

> [O]n a sports page, only the format of the webpage may be stored at the host computer in Chicago. The advertisement may come from a computer in California (and it may be a different advertisement each time the page is requested), the sports scores may come from a computer in New York City, and a part of the webpage that measures Internet traffic and records the user's visit may involve a computer in Virginia. If the user decides to buy something from this webpage, say a sports jersey, the user clicks on the purchase page and may be transferred to a secure web server in Maryland for the transaction.

an Internet user may, for example, access websites that reside on servers in various state[s] or foreign countries, communicate directly with another Internet user, or chat on-line with a group of Internet users located in the same local exchange or in another country, and may do so either sequentially or simultaneously."[70] The Commission has recognized that "[m]ost Internet-bound traffic traveling between a LEC's subscriber and an ISP is indisputably interstate in nature when viewed on an end-to-end basis."[71] Furthermore, the highly dispersed nature of the facilities necessary to complete an Internet communication renders any attempt to identify an intrastate component of each such communication nearly impossible. Thus, to the extent that an Internet communication has an intrastate component, it is obscured by the very nature of the Internet.

These features of the Internet are shared by IP platform services. IP platform services rely on the same dispersed networks that comprise the Internet, and therefore the services (and underlying IP platforms) provide the capability to interact with a multitude of information sources in different jurisdictions during a single communication. The key enabling equipment for IP platform services (such as web servers or soft-switches) will in many cases be located

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*Id.* at 9178 ¶ 58.

70 *GTE Order* at 22478-79 ¶ 22.

71 *ISP Remand Order* at 9178 ¶ 58. The D.C. Circuit subsequently remanded the *ISP Remand Order* on the ground that the Commission had inadequately explained why dial-up Internet-bound traffic falls outside the scope of the "reciprocal compensation" provision of section 251(b)(5). *See WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). But neither in that decision nor in the D.C. Circuit's previous decision on reciprocal compensation did the court express any doubt about the Commission's end-to-end basis for exercising exclusive *jurisdiction* over such traffic. *See Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000) ("[t]here is no dispute that the Commission has historically been justified" in employing an end-to-end analysis to treat Internet-bound traffic as interstate, even for dial-up Internet access terminating at a local modem bank).

outside the state in which a particular user is located. When end users use IP platform services to communicate with each other, the interstate nature of the Internet is engaged no matter where the end users are physically located. Consider, for example, a computer-to-computer VoIP call between two end users located in buildings on the same block in downtown Washington, D.C. Even though each end user is physically located in the same jurisdiction, the transmission, storage, and processing of their e-mails are likely to involve servers located in other states.

As with the Internet, isolating a discrete intrastate component of an IP platform service to justify the exercise of state jurisdiction would be difficult if not outright impossible. On traditional telephone networks, it generally is possible to determine whether a call is interstate or intrastate because a single carrier provides a physical connection to the end user. But the technology underlying IP platform services renders the notion of an "intrastate" call almost meaningless. As convergence continues, a data stream may simultaneously include packets (consisting of voice, data, video, or some combination thereof) bound for points both in and outside any given state. But because there is no feasible way for carriers to track, on a bit-by-bit basis, the exact content or routes of those packets on an IP platform,[72] it would be impracticable, as well as inimical to the technological premise of the Internet, to separate out any discrete, "intrastate" components of that data stream.[73]

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[72] Routing of IP traffic is based on matching a numeric IP address to a particular device, such as an end user's computer, a router, or a server, to name a few, rather than a geographic destination.

[73] *See Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998) (observing that "the services provided by ISPs may involve both an intrastate and an interstate component and it may be impractical if not impossible to separate the two elements"); First Report and Order and Further Notice of Proposed Rulemaking, *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983, 23031-32 ¶ 107 (2000) ("Because fixed

Such tracking theoretically could be "possible," if one embraces the principle that with enough time and money *anything* is possible from a technological perspective. But there is no *service-driven* reason for committing those resources to develop such tracking capabilities. In a dynamic, competitive industry, it makes little sense to devote dollars to developing useless, inefficient technological capabilities that would improve neither service nor efficiency. But this is precisely what would be required to try to break the integrated flow of traffic on the Internet down into jurisdictional chunks. The ramifications of such an effort would almost certainly be significant and negative for the development of new and innovative IP services and applications.[74]

The difficulty of delineating the interstate and intrastate portions of an Internet communication would be compounded by the increasingly portable nature of IP platform service offerings. End users can take their laptops to any location but "virtually" remain in their home office. Consider again two end users in Washington, D.C. One may take his laptop to San Francisco while keeping in e-mail contact with his acquaintance back in Washington, D.C., who may not even know that his correspondent has flown to the other side of the country. And VoIP permits telephone calls to be placed with the same geographical indifference: Depending on the

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wireless antennas are used in interstate and foreign communications and their use in such communications is inseverable from their intrastate use, regulation of such antennas that is reasonably necessary to advance the purposes of the Act falls within the Commission's authority."); *see generally Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986) (addressing FCC's jurisdiction "where it was not possible to separate the interstate and intrastate components of the asserted FCC regulation").

[74] If a communication begins and ends on the PSTN, however, its geographic origin and destination can be tracked — even if the communication is converted to IP for transmission between those points on the PSTN.

particular service used, a user can plug his phone into any broadband connection anywhere in the country, and the call will appear to be placed from the user's chosen area code. In this regard, IP platform-based communications can be analogized to wireless calls, which (for the most part) also fall within the exclusive regulatory jurisdiction of the federal government.[75] It would be nonsensical, as well as impractical and cumbersome, to develop regulations for IP platform services that hinge on the physical location of the sender or recipient of those services.[76]

Reaffirmation of the inherently interstate nature of IP platform services — and thus of the Commission's exclusive authority over them — is not only legally appropriate, but competitively critical. Investors and developers putting together a global network of networks cannot operate within a patchwork of myriad different state rules (and different frameworks for the applicability of those rules). The Internet's infrastructure ignores state boundaries, and the routing of IP traffic is specifically designed, for efficiency's sake, to transcend geographic distinctions and the necessity for fixed point-to-point routing. If states are permitted to impose regulatory requirements on IP platform service providers, those providers may, within a moment's time,

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75 *See* 47 U.S.C. § 332(c).

76 Because IP platform services, as defined above, originate and/or terminate in IP format, one cannot practicably segregate an intrastate component of these services for jurisdictional purposes. Nevertheless, when IP platform services originate as circuit-switched traffic on the PSTN (and terminate in IP) or, after originating in IP format are converted to circuit-switched traffic and terminate over the PSTN, there is no reason that intrastate access cannot and should not be taken into account in the assessment of intercarrier compensation. For example, the impracticability of tracking the flow of IP platform services traffic for jurisdictional purposes does not mean that circuit-switched service providers cannot use information they obtain from IP providers, such as calling party number information, for use in assessing appropriate access charges. As discussed *infra*, any changes in intercarrier compensation should be addressed in the intercarrier compensation proceeding. *See infra* for a discussion of access charges.

find that the entire regulatory landscape under which it operates has shifted dramatically. This risk can only deter innovation and investment.

Finally, because the Internet is global in scope, Commission primacy within the United States is necessary to enable this country to continue to exercise leadership in shaping the policies that will govern the Internet worldwide. The United States has traditionally led other nations in the development of Internet-based applications, and a definitively deregulatory national policy will both set an example for the world and establish the conditions under which United States entrepreneurs can continue to lead internationally.

This last point has urgency of its own. Other nations are quickly gaining ground on the United States by taking affirmatively deregulatory positions with respect to the Internet. For example, Japan has recently adopted deregulatory measures for IP platform services that have enabled broadband penetration to increase sevenfold over a two-year period, to reach a level roughly equivalent to that in the United States.[77] Perhaps most notably, the South Korean government has consistently pursued a "hands-off" policy with respect to the Internet,[78] which has helped it to lead the world in broadband deployment.[79] Such developments not only undermine the status of the United States as the perceived leader in international Internet policy,

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[77] *See, e.g.*, Phred Dvorak, *New Connections: A Web Maverick Sparks Revolution In Wiring Japan*, Wall St. J. (Oct. 17, 2003) ("Japan had 11.8 million high-speed Internet subscribers as of August, up more than sevenfold from 1.6 million two years earlier. That gives it a broadband penetration rate of almost 10%, around U.S. levels.").

[78] *See* Kyounglim Yun *et al.*, *The Growth of Broadband Internet Connections in South Korea: Contributing Factors* at 10, Asia/Pacific Research Center (Sept. 2002) ("South Korea is considered to have one of the most liberalized telecommunications sectors in Asia.").

[79] *See id.* at 11 ("It has been widely reported that South Korea is the most wired country in terms of broadband.").

but also may threaten the Internet-based economy in the United States by inducing providers of IP platform services to relocate their facilities to countries with more hospitable regulatory environments.[80] To maintain the U.S. position of primacy and avoid the economic consequences of inaction, the Commission should act now to reestablish itself and the United States as a leader in Internet unregulation.

### B. Under Its Title I Authority, the Commission May Craft Any Regulations That May Be Necessary and Appropriate for IP Platform Services.

As Chairman Powell noted recently, a new approach to IP services does not necessarily mean "no regulations . . . . It means the right regulations for this service."[81] It will be increasingly important, for example, to consider appropriate means of addressing such concerns as E911 capabilities, communications assistance to law enforcement, universal service, and access for persons with disabilities.

Title I affords the Commission ample authority to address these concerns. In designing the Communications Act in 1934, "Congress sought 'to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications.'"[82] Title I embodies the "'comprehensive mandate'" that Congress gave the Commission to enable it to manage developments in "a field that was demonstrably 'both new

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80 *See, e.g.*, Comments of Michael Gallagher, Assistant Acting Secretary, U.S. Department of Commerce, FCC Forum on Voice over Internet Protocol (VoIP) (Dec. 1, 2003).

81 *Powell Internet Remarks.*

82 *Computer & Communications Indus. Ass'n*, 693 F.2d at 213 (quoting *General Tel. Co. v. United States*, 449 F.2d 846, 853 (5th Cir. 1971)).

and dynamic.'"[83] Emerging IP platform services are exactly the sort of "new and dynamic" development that Congress envisioned the Commission would face the need to consider and for which it provided the requisite authority under Title I. Indeed, the Commission has previously recognized its regulatory authority under Title I.[84]

The regulatory flexibility afforded by Title I is particularly important given the collaborative industry efforts already underway to deal with these very issues in the context of IP platform services. For example, industry representatives are already meeting to develop solutions to the more pressing public safety and consumer protection issues posed by emerging IP technologies, such as the needs of law enforcement and public safety (*e.g.*, communications assistance to law enforcement and E911). The Commission should coordinate and encourage these collaborative processes and use its Title I authority to craft a uniform policy framework. Specifically, the Commission should conduct a rulemaking to consider whether any particular public policy mandates would be appropriate for IP platform services, including any that might be similar to those currently applied under Title II. This will create an open forum in which all interested parties, including the states, may discuss the future regulation of IP services. But that dialogue should proceed pursuant to unifying principles set at the *federal* level.

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83 *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 173 (1968) (quoting *National Broad. Co. v. United States*, 319 U.S. 190, 219 (1943)).

84 *See, e.g.*, Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd 6547, 6610 ¶ 148 (2001) ("*AOL/Time Warner Merger Order*") (concluding that IM services are communications by wire and/or radio and thus that "new IM-based services . . . are subject to our jurisdiction under Title I of the Communications Act"); *see also Cable Modem Order* at 4839-40 ¶ 72; *Southwestern Cable*, 392 U.S. at 173.

## II. THE COMMISSION SHOULD DECLARE THAT IP PLATFORM SERVICES ARE NOT SUBJECT TO TITLE II PROVISIONS APPLICABLE TO TELECOMMUNICATIONS CARRIERS.

Having determined that IP platform services do fall within the Commission's regulatory jurisdiction under Title I, the Commission should declare that they do *not* also fall within Title II. IP platform services are inherently information services (and can be expected even more clearly to fall within that category in the future), and they are also private carriage. As we discuss, a determination that they fall outside Title II will not disturb the application of the competitive safeguards that Congress and the Commission have created to ensure access to legacy transmission networks.

### A. IP Platform Services Do Not Fall Within Title II of the Act.

A defining characteristic of IP platform services is that they transcend the service categories that define the scope of the substantive titles of the Communications Act. The Act was written at a time when, for the most part, particular *services* were tightly linked to particular *facilities* and the facilities were owned by monopoly or near-monopoly providers. Those providers were made subject to disparate regulatory regimes codified in the Act's service-specific Titles (telephone companies were subject to Title II, broadcasters to Title III, and cable companies to Title VI). The IP platform obliterates those old regulatory assumptions, freeing particular services and applications (such as web browsing, e-mail, voice, or streaming video) from the need to run on dedicated physical facilities. As a result, end users can use the Internet platform — and its multiplicity of underlying networks — for services and applications that look like "telecommunications services" regulated under Title II (for example, certain forms of VoIP); broadcast services regulated under Title III (for example, streaming audio and video); and cable services regulated under Title VI. If the regulatory treatment of IP platform services was determined on the basis of how some of the characteristics of these services appear in isolation,

they could be classified under any of these substantive Titles. But that would be inappropriate and counterproductive.

It is more accurate to view IP platform services as "information services," which the Commission has recognized are properly treated under Title I. The heart of an IP platform service is the provision of an information and communications management tool — a means of fusing computing power and communications. Use of an IP platform to provide a service that originates or terminates in IP intrinsically offers "a *capability* for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[85] IP platform services thus bear attributes of information services no matter what the individual application. "[I]f the user can receive nothing more than pure transmission, the service is a telecommunications service. If the user *can receive* enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service."[86]

The latter description fits today's and tomorrow's IP platform services. In fact, if anything, IP platform services will fall within the "information services" category of the Act even more clearly as they develop. For example, IP platform services being introduced today allow customers to control many aspects of their communications directly from their desktop — a dramatic change from centrally controlled telecommunications networks. And these services are evolving toward even greater integration of voice, data, and video applications, affording both providers and customers greater flexibility and value. In a recent study of the priorities of

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85 47 U.S.C. § 153(20) (emphasis added).

86 *Report to Congress* at 11530 ¶ 59 (emphasis added).

service providers, providers listed "managed services," "IP networking," and "converged services" as the kinds of services and applications they viewed as most likely to be productive in the future.[87] This trend is not surprising, given that the nature of innovation is to go beyond the capabilities of existing services. In light of this, it will be increasingly clear over time that all IP platform services offer capabilities that place them in the information services category. The Commission should take this evolution of IP platform services into account in declaring that these services are inherently information services.

The fact that IP platform services may be used to carry voice or other traditional forms of communication should not alter their classification as information services. IP technology can and does support a variety of end user *applications*, whose functionalities encompass those of traditional communications *services* (such as voice and data) that carriers have long provided to end users over legacy networks specially designed for those services. But when an ISP provides, for example, Internet access and the means for end users to run voice applications on top of IP functionality, the ISP does not for that reason become a "telecommunications provider," and its facilitation of voice applications is not a "telecommunications service" subject to Title II regulation. Instead, the voice applications run as part of a larger bitstream containing a variety of other applications also running on the same IP platform. In fact, it is this characteristic of the IP platform that makes it such a good vehicle for delivering information services.

It would be infeasible, and contrary to Commission precedent, to try to select out for individualized regulatory treatment any of the specific applications that customers may perform

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[87] *See* Richard Thayer *et al.*, *World Network Equipment Industry Recovery 2002-2003*, Practising Law Institute, 731 PLI/Pat 467, 500-01 & fig.21 (PLI Patents, Copyright, Trademarks, and Literary Property Course 2002).

over an IP platform service. The real power of the IP platform is that it enables the convergence of voice, data, and video. As the Commission has confirmed, the provider of IP platform services "do[es] not offer subscribers separate services — electronic mail, Web browsing, and others — that should be deemed to have separate legal status."[88] Instead, an IP platform service, including basic Internet access, is properly deemed an information service "regardless of whether subscribers use all of the functions provided as part of the service, such as e-mail or web-hosting, and regardless of whether every . . . service provider offers each function that could be included in the service."[89] Indeed, most IP platform services — particularly those used by businesses — are marketed not as traditional telephony services, but as multi-application offerings that a customer would not order (or pay for) if it sought merely a substitute for a legacy telecommunications service, as the price differentials between these products and ordinary voice telephony products illustrate.

IP platform services also have the character of private carriage, as the Commission has developed that concept.[90] As described above, the various networks and backbones that comprise the Internet are interconnected through private peering and transiting arrangements.

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88 *Report to Congress* at 11536-37 ¶ 75.

89 *Cable Modem Order* at 4822-23 ¶ 38 (footnote omitted); *see also Report to Congress* at 11543-44 ¶ 88.

90 *See, e.g., Triennial Review Order* at 17076-77 ¶ 152 ("Generally stated, a common carrier holds itself out to provide service on a non-discriminatory basis. A private carrier, on the other hand, decides for itself with whom and on what terms to deal. Common carrier status has been assessed by the Commission and the courts by the application of the two-part NARUC test: (1) whether the carrier 'holds himself out to serve indifferently all potential users'; and (2) whether the carrier allows customers to 'transmit intelligence of their own design and choosing.'") (footnotes and citations omitted).

These are commercially negotiated arrangements that differ one from another to reflect the needs of the parties and the nature of their activities. This tailor-made characteristic of many IP platform services is likely to be increasingly common in the future. For example, as described above, the proliferation of IP-VPNs will, by definition, give many such services a more private, user-tailored character, allowing end users to dictate everything from transmission paths to the degree of QoS required.

In this regard, IP platform services generally share the traits of the Internet-based services provided by cable companies. In that context, the Commission determined that any transmission services that cable companies sell to ISPs in connection with cable modem service should be deemed to fall outside the scope of "common carriage" on the ground that those companies do, and should remain free to, deal with ISPs on an individualized basis.[91] The same reasoning applies to any individualized provision of IP platform services — including Internet backbone services — to any class of customers. While such services may sometimes involve the provision of transmission directly to end users (rather than to intermediate ISPs), they represent the very sort of targeted, individualized offerings that never have been, and should not now be, regulated as traditional common carriage.[92]

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91 *Cable Modem Order* at 4829-30 ¶¶ 54-55. Notwithstanding its other holdings, the Ninth Circuit declined to second-guess that determination in *Brand X*. *See Brand X*, 345 F.3d at 1132 n.14.

92 This conclusion comports with the Commission's longstanding observation that the "public interest requires common carrier operation" of facilities only where the operator "has sufficient market power to warrant regulatory treatment as a common carrier." Memorandum Opinion and Order, *AT&T Submarine Sys., Inc.*, 13 FCC Rcd 21585, 21589 ¶ 9 (1998) (finding that a provider of a digital submarine cable system need not be regulated as a common carrier where there were sufficient alternative facilities available). As discussed, no provider — and certainly no ILEC — has disproportionate market power in the provision of IP platform services.

But classifying IP platform services as "information services" or "private carriage," by itself, may be inadequate to capture the full array of existing and potential IP-based technologies and offerings. The main consideration is not whether every conceivable IP platform service fits into one or the other of these traditional categories of unregulated services. The key factor is that IP platform services fit neither the terms nor the purposes of those legacy regulatory regimes. The Commission thus should expressly find that these services fall outside those titles and are subject only to Title I.[93]

### B. The Commission Should Declare that the Computer II Requirements Do Not Apply to IP Platform Services.

The Commission also should declare that the *Computer II* unbundling requirements do not apply to IP platform services. As explained above, ensuring that IP-enabled networks are free from regulation is just as important as ensuring that IP platform services remain unregulated. Requiring providers of IP platform services to break off the transmission component of these offerings and provide them as a telecommunications service would, like the imposition of Title II regulation generally, constrain the innovation and investment that are essential to the continued development of these technologies. In fact, mandating the offering of discrete IP-based telecommunications services necessarily would extend Title II regulation to IP platforms — a result the Commission previously rejected with respect to cable modem service.

In the *Cable Modem Order*, the Commission noted that its prior decisions requiring carriers that provide information services to offer the underlying transport as a stand-alone

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[93] To the extent that IP platform services, or particular applications or components of them, may be viewed as bearing characteristics of traditional telecommunications services, the Commission should forbear from the applying Title II to them, as SBC requests in its separately filed forbearance petition.

service involved "traditional wireline common carriers providing telecommunications services (*e.g.*, telephony) separate from their provision of information services."[94] The Commission concluded that, even if *Computer II* applied in the very different context of cable modem services, its applicability should be waived, in part due to the Commission's belief that many providers would cease to provide the services that might trigger that obligation.[95] This result, the Commission found, would "disserve the goal of Section 706 that we 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.'"[96] Those conclusions are fully applicable to IP platform services generally, and the Commission accordingly should declare that the *Computer II* requirements do not apply to them and implement that ruling through a waiver or any other appropriate means.[97]

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94 *Cable Modem Order* at 4825 ¶ 43.

95 *See id.* at 4826 ¶ 47.

96 *Id.* at 4826 ¶ 47 (quoting 47 U.S.C. § 157(a) notes).

97 To the extent that *Brand X* suggests that there is a *statutory* requirement to isolate the transmission component of an information service and offer it separately as a telecommunications service, and to the extent that such a ruling survives further judicial proceedings, the Commission should forbear from applying such a requirement to IP platform services as advocated in the forbearance petition we have filed separately today. As explained further below, neither a declaration that IP platform services are not subject to the *Computer II* regime nor forbearance will affect the availability of legacy transport services.

### C. A Declaration that IP Platform Services Are Not Subject to Title II Will Not Affect the Applicability of Title II to Legacy Telecommunications Services and Networks.

A Commission declaration limiting the scope of Title II regulation as requested herein would in no way affect existing regulation of legacy networks and services by either state or federal regulators, or predetermine the outcome of pending proceedings relating to legacy broadband services. Rather, the Commission would quite specifically be precluding the encroachment of common carrier regulation into the IP sphere, maintaining the status quo for IP platform services, and accommodating with regulatory certainty the evolution of IP network technology, services, and applications.

Two safeguards in particular ensure that a Commission determination that IP platform services must remain unregulated will have no effect on rights of access to legacy, non-IP-based services and certain of the facilities that support them. *First*, no matter what services an ILEC might provide over given facilities in its network, a CLEC would still be entitled to lease those underlying network elements that meet the standards of section 251(d)(2), as such standards are evaluated from time to time by the Commission. Thus, to the extent the Commission retains unbundling obligations for xDSL-capable loops, as an example, that obligation would continue notwithstanding a determination that IP platform services offered over that loop are unregulated. *Second*, ILECs would remain subject to the *Computer II* obligations in offering non-IP-based information services, thus ensuring unbundled access to the basic serving elements of these legacy services.[98]

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[98] As permitted by the *Computer II* framework, of course, carriers may seek and obtain relief from such obligations where appropriate. In any event, such relief pertaining to legacy services would not be a function of the relief requested in this petition.

For instance, ILECs would retain their existing obligations to provide ISPs with access to legacy, non-IP-enabled frame relay and ATM services on a common carriage basis. Likewise, ISP access rights to today's common carrier DSL transport services would be untouched by a Commission declaration that IP platform services are unregulated, because, among other things, DSL transport today is an ATM-based transmission service.

Just as relief here would not alter the regulatory framework for non-IP-based services, it would not prejudge Commission action in pending proceedings related to legacy services. In the *Broadband Non-Dominant NPRM* proceeding,[99] SBC and other ILECs seek non-dominant treatment for their broadband telecommunications services, including legacy packet transmission services such as ATM and frame relay. The record evidence in that proceeding is compelling that SBC is not dominant in the provision of such services, and the issue is ripe for consideration. But because the services at issue in that proceeding would not as a technical matter fall within the scope of the instant petition, any relief granted here would neither prejudice the outcome of the *Broadband Non-Dominant NPRM* nor alter the fundamental regulatory regime under which it will be decided. The same is true of the *Title I NPRM* proceeding,[100] in which the Commission is evaluating the appropriate regulatory framework for wireline broadband Internet access. While it is true that the proceeding could (and, indeed, should) modify the manner in which DSL transport service is regulated (such as through the modification or elimination of the *Computer II*

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[99] Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd 22745 (2001) ("*Broadband Non-Dominant NPRM*").

[100] Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019 (2002) ("*Title I NPRM*").

rules as applied to such service), it will do so in isolation of the relief needed and requested here in connection with IP platform services.

In short, the framework articulated here permits the bright-line demarcation necessary to preclude Title II encroachment upon the IP sphere — and the attendant suppression of carrier investment and deployment that surely would result. Because legacy telecommunications networks and services are excluded from this petition, however, the petition in no way prejudices the Commission's ability to craft appropriate regulations for competitive access to those networks and services.

*Access Charges.* SBC recognizes that a decision to create an unregulated environment for IP platform services, as defined herein, could raise questions about the applicability of access charges to these services. Access charges present unique issues because of their universal service implications.

The Commission's rules, in fact, already speak directly to a number of these questions. For example, the Commission's rules do not — and never have — required the payment of access charges on services that do not touch any local exchange circuit-switched facilities of the PSTN. Conversely, as SBC has demonstrated in its filings on AT&T's access avoidance petition, when a service originates and terminates on the PSTN, access charges apply to that service under the Commission's existing rules — regardless of whether the service is transported for some distance in an IP format over an IP network between the points of origination and termination on the PSTN.[101]

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101 *See* Memorandum by SBC Communications, Inc., Urging the Commission to Deny AT&T's Access Charge Avoidance Petition, WC Docket Nos. 02-361, 03-211 & 03-266,

Some IP platform services that originate on an IP platform may be subsequently converted into a circuit-switched format for termination on the PSTN. Similarly, some circuit-switched services that originate on the PSTN may be subsequently converted to an IP format for termination over an IP platform. In these situations, access charges apply to the extent the service uses local exchange circuit-switched facilities on the PSTN. We recognize, however, that the Commission may want to consider whether its current rules provide the best means of classifying the traffic described in this paragraph for access charge purposes.[102] To the extent the Commission deems it necessary to consider any changes in its access charge rules, or the establishment of new rules, those matters should be addressed in the pending intercarrier compensation proceeding. It is only in that context that the unique issues raised by access charges can be addressed holistically and in a manner that does no harm to the Commission's longstanding commitment to the goal of universal service.

## CONCLUSION

The Commission should eliminate regulatory uncertainty by confirming that IP platform services are not subject to legacy economic regulation at either the federal or state levels. To do so, the Commission should (i) reaffirm that these interstate services and networks fall within its exclusive regulatory jurisdiction under Title I; (ii) declare that IP platform services fall outside the scope of Title II and, for that matter, do not fall within any of the Act's other substantive

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attached as an exhibit to Letter from James Smith, SBC, to Michael Powell, FCC, WC Docket No. 02-361 (Jan. 14, 2004). Likewise, intrastate access charges apply to the extent such services originate and terminate within state boundaries.

102 *See supra* note 76.

titles; and (iii) declare that the *Computer II* requirements do not apply to these services.[103] The Commission can best serve the public interest in this area by establishing a regulatory clean slate and applying individual regulatory requirements as needed pursuant to the Commission's authority under Title I. Eliminating the specter of Title II regulation of the Internet and its component networks and services is the single most important step the Commission can take to foster advances in IP technology and promote the continued growth and evolution of the Internet.

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February 5, 2004

[103] The Commission also should forbear from applying Title II regulation to IP platform services, as explained in SBC's separate petition for forbearance.